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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91178539
Party	Defendant Omnisource DDS, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SmithKline Beecham Corporation
Opposer,

v.

Omnisource DDS, LLC,
Applicant.

Opposition No. 91178539

Application Serial No. 78893144

Mark:

AQUAJETT

**APPLICANT'S RESPONSE TO
OPPOSER'S MOTION TO STRIKE
APPLICANT'S SUPPLEMENTAL NOTICE OF RELIANCE**

Applicant hereby responds regarding Opposer's motion to strike applicant's supplemental notice of reliance.

Applicant's Deposition Testimony

Opposer first objects to the deposition testimony contained in Applicant's Supplemental Notice of Reliance because the relevant portions were not attached. Applicant, as it noted in the Supplemental Notice of Reliance, merely attempted to conserve paper and resources for all parties including Opposer and the Board because each were already physically and electronically in possession of the entire deposition transcript (via the TTABVUE system at <http://ttabvue.uspto.gov/ttabvue/ttabvue-91178539-OPP-33.pdf>, Exhibit 2). Nonetheless, without admitting any wrongdoing, Applicant attaches hereto as Exhibit 2 the relevant portions of the deposition transcript cited in Applicant's Supplemental Notice of Reliance.

Second, Opposer objects to the deposition testimony contained in Applicant's Supplemental Notice of Reliance, Exhibit 2, for lack of sufficient justification. However,

Applicant has provided, in its Supplemental Notice of Reliance, sufficient justification for its reliance on the cited portions of the discovery deposition. Applicant complied with the relevant rules and the Board's order, namely TBMP § 704.09 and 37 C.F.R. § 2.120(j)(4), which states that:

If only part of a discovery deposition is submitted and made part of the record by a party, an adverse party may introduce under a notice of reliance any other part of the deposition which should in fairness be considered so as to make not misleading what was offered by the submitting party. A notice of reliance filed by an adverse party must be supported by a written statement explaining why the adverse party needs to rely upon each additional part listed in the adverse party's notice...

For example, regarding Pages 22 – 24, 39, 51 of Dr. Weissman's deposition included in Applicant's Supplemental Notice of Reliance, Applicant included the following justification:

[The portions contain a] description of Applicant's product, its market, and its functions, potential consumers, along with possible brand names, provide evidence regarding Applicant's bona fide intent to use the mark which is necessary to contradict Opposer's attempts to show a lack of bona fide intent, including Opposer's excerpts of the same deposition in Opposer's Fifth Notice of Reliance regarding Applicant's lack of sales, lack of manufacturing schematics or agreements, lack of marketing materials, and the like... *Applicant's Supplemental Notice of Reliance* at p. 2.

Regarding pages 29-33, 45-46, 58-59 of Dr. Weissman's deposition included in Applicant's Supplemental Notice of Reliance, Applicant included the following justification:

[The portions contain a] description of Applicant's principle's patents and possible licensing of the products, including sending letters to potential licensees. This testimony is evidence of Applicant's bona fide intent to use its mark and necessary to contradict Opposer's attempts to show a lack of bona fide intent, including Opposer's excerpts of the same deposition in Opposer's Fifth Notice of Reliance regarding Applicant's lack of sales, lack of manufacturing schematics or agreements, lack of marketing materials, and the like.... *Applicant's Supplemental Notice of Reliance* at p. 2.

Regarding pages 41-42 of Dr. Weissman's deposition included in Applicant's Supplemental Notice of Reliance, Applicant included the following justification:

Dr. Weissman's description of trade show attendance evidences Applicant's bona fide intent to use the mark which is necessary to contradict Opposer's attempts to show a lack of bona fide intent, including Opposer's excerpts of the same deposition in Opposer's Fifth Notice of Reliance regarding Applicant's lack of sales, lack of manufacturing schematics or agreements, lack of marketing materials, and the like... *Applicant's Supplemental Notice of Reliance* at p. 3.

Regarding pages 51-52 of Dr. Weissman's deposition included in Applicant's Supplemental Notice of Reliance, Applicant included the following justification:

Minutes from meetings of Applicant's partners are evidence of Applicant's bona fide intent to use the mark which is necessary to contradict Opposer's attempts to show a lack of bona fide intent, including Opposer's excerpts of the same deposition in Opposer's Fifth Notice of Reliance regarding Applicant's lack of sales, lack of manufacturing schematics or agreements, lack of marketing materials, and the like.... *Applicant's Supplemental Notice of Reliance* at p. 4.

Applicant has properly justified its reliance on each cited section of the deposition transcript. Nearly the entire portion of the deposition transcript cited in Opposer's testimony arguably relates to the issue of a bona fide intent to use by Applicant.¹ For example, the following portions included in Opposer's testimony, and copies on the subsequent pages, specifically inquire to facts related to Applicant's assertion of a bona fide intent to use its mark.

Page 45, line 15 – page 46, line 6

14
15 Q. Okay. Can I direct your attention to the second
16 page. This is an interrogatory which says "State all
17 facts and identify all documents supporting Applicant's
18 assertion in its application Serial No. 78/893,144 that
19 it had as of the application filing date a bona fide
20 intention to use Applicant's mark in commerce in
21 connection with the goods identified in the
22 application."

23 Now, below that is the answer to this
24 interrogatory, which was provided by Omnisource. And
25 the last paragraph says, "See documents produced by

1 Applicant. Applicant's bona fide intent to use the
2 Aquajett mark in commerce is evidence in Applicant's
3 patent filings and other documents indicating an
4 intention to manufacture dental instruments." Do you
5 see that, Dr. Weissman?

6 A. Yes.

Page 47, lines 9-19

9 Q. Aside from those exhibits that I just mentioned
10 and the patents that we were discussing, are there any
11 other documents that Omnisource has that would relate in
12 any way to your intention to use the mark Aquajett?

13 A. Not that I can recall at this moment.

14 Q. How about the other marks that you applied for?

15 A. Same response.

16 Q. Same answer. So I'm correct in assuming that you
17 have not created any media plans for the oral irrigator
18 products that are described in these patents?

19 A. Correct.

16
17 MR. BERTIN: I've marked as Opposer's Exhibit 11
18 a document called Applicant's Objections and Responses
19 to Opposer's First Request for Production of Documents
20 and Things. This is a filing made by the Applicant in
21 this case responding to a request for documents that was
22 previously served by the Opposer.

23 (Opposer's Exhibit 11 was marked for
24 identification by the court reporter.)

25 BY MR. BERTIN:

1 Q. Dr. Weissman, I'm going to hand this document to
2 you in a second. I'm going to ask specifically about
3 your responses to Request Nos. 4, 5, 6, and 11. These
4 responses are similar in that it indicates here that,
5 quote, "The Applicant intends to market the goods to
6 users of oral care goods." Just to clarify, "oral care
7 goods" again would include toothpaste, toothbrushes,
8 toothpicks, floss, oral irrigators. Anything else in
9 that category?

10 A. Mouthwash. Yeah, those are generally the items.

11 Q. And the users of those items would be ordinary
12 consumers?

13 A. Yes.

In addition, other sections in Opposer's testimony relate to circumstances surrounding Opposer's claim of a lack of a bona fide intent by Applicant to use its markⁱ, including:

Page 22, lines 3 – 23:

3 Q. When we started talking earlier this morning, you
4 indicated that Omnisource plans to or is hoping to sell
5 a number of oral care goods, including oral irrigators.
6 Are the oral irrigators that are described in these
7 patents, the products Omnisource -- specifically the
8 oral irrigators that Omnisource is working on or that
9 you intend to sell?
10 A. Yes.
11 Q. Aside from the products that are described in
12 these three patents, does Omnisource intend to sell any
13 other oral irrigators?
14 A. No.
15 Q. What is the target audience or the target market
16 for the oral irrigators that Omnisource intends to sell?
17 A. To the general consuming public who's interested
18 in oral care goods.
19 Q. Ordinary consumers?
20 A. Ordinary consumers.
21 Q. What about dental professionals such as dentists,
22 orthodontists, endodontists?
23 A. They could potentially purchase these.

Page 24 line 12 – page 25 line 4

12 Q. Have you selected a brand name for this product?
13 A. No. I have several names that I have applied for
14 trademark names, but not any one specifically that's
15 been selected.
16 MR. BERTIN: Let's mark a few exhibits.
17 Opposer's Exhibits 5, 6, 7, 8, 9 are printouts
18 from the U.S. Trademark Office, TESS and TARR databases,
19 and these are for applications for the marks Aquajett,
20 Omnijet, Omnipik, Showerjet, and Aquapik.
21 (Opposer's Exhibits 5 through 9
22 were marked for identification by
23 the court reporter.)
24 BY MR. BERTIN:
25 Q. If you could take a moment to look these over,

1 Dr. Weissman.
2 Are these the marks that you were referring to a
3 moment ago?
4 A. Yes.

Page 30, line 10 - page 32, line 1

10 Q. Do you have any schematics for this product, how
11 it would be built?
12 A. No.
13 Q. Have you identified what types of materials would
14 be used to construct this product?
15 A. No.
16 Q. Have you entered into any agreements to
17 manufacture this product?
18 A. No.
19 Q. Have you given any thought to where these
20 products would be made, manufactured?
21 A. No.
22 Q. Do you plan to manufacture them yourself or do
23 you plan to contract with a third-party to manufacture
24 them?
25 A. More than likely, contract with a third-party.

1 Q. Have you identified any potential third-parties
2 to manufacture the product for you?
3 A. No.
4 Q. Have you done anything to identify any potential
5 third-parties?
6 A. No.
7 Q. Are you planning to sell oral irrigators
8 yourself, or are you planning to license them to
9 third-parties who would then sell them to consumers?
10 A. Both ways have been contemplated, but no decision
11 has been made.
12 Q. You haven't decided one way or the other?
13 A. Correct.
14 Q. And am I correct in assuming that you obviously
15 had not made that decision at the time that you filed
16 your trademark applications either?
17 A. Correct.
18 Q. Have you given any thought to what types of
19 third-parties that you would license this product to?
20 A. Generally, companies which would be in the oral
21 care industry.
22 Q. If I could clarify that answer a little bit, what
23 segment of the oral care industry, if any?
24 A. That would probably be any companies that would
25 be in the oral care industry who are in the preventative

1 oral care field.

2 Q. Have you done anything to identify specific
3 segments of those businesses whom you might contact?
4 A. No.
5 Q. Have you prepared any agreements that you might
6 use with these types of companies for licensing your
7 oral irrigator products?
8 A. No.
9 Q. Am I correct in assuming that you have not sent
10 any marketing materials to any third-parties concerning
11 your oral irrigator products?
12 A. Correct.
13 Q. Have you developed any marketing materials for
14 your oral irrigator products?
15 A. No.
16 Q. Did you have any marketing materials for these
17 products at the time that you filed your application?
18 A. No.
19 Q. Have you given any thought to what types of
20 marketing materials you might develop for this product?
21 A. No.

1 Q. Have you created any logos for any of the
2 trademarks that you filed applications for?

3 A. No.

4 Q. Have you hired anyone to create packaging for
5 you?

6 A. No.

7 Q. Hired anyone to create labels for you?

8 A. No.

9 Q. Tags?

10 A. No.

11 Q. Logos?

12 A. No.

13 Q. Have you entered into any agreements with any
14 third-parties to do any of these things for you?

15 A. No.

16 Q. Have you identified any third-parties who might
17 be in a position to do these things for you?

18 A. No.

19 Q. Do you have any plans as to how you might go
20 about creating your packaging for this product?

21 A. No.

22 Q. Any plans for how you might go about creating a
23 label for this product?

24 A. No.

25 Q. Any plans for how you might go about creating a

1 logo for this product?

2 A. No.

3 Q. And that's true today and it was true at the time
4 that you filed your applications?

5 A. Correct.

6 Q. That's true for the mark Aquajett?

7 A. Correct.

8 Q. Is it true for all of the other marks that you
9 filed applications for?

10 A. Correct.

11 Q. Have you offered or shown this product at any
12 trade shows?

13 A. No.

5 Q. Am I correct in assuming that you have not placed
6 any advertisements for your oral irrigator product?
7 A. Correct.
8 Q. At any time?
9 A. Correct.
10 Q. Have you created any advertisements for this
11 product?
12 A. No.
13 Q. You've not created any point-of-sale material for
14 this product?
15 A. No.
16 Q. No brochures?
17 A. No.
18 Q. No flyers?
19 A. No.
20 Q. No displays?
21 A. No.
22 Q. No internet ads?
23 A. No.
24 Q. No television or radio commercials?
25 A. No.

As a result of Opposer's use of testimony from the deposition regarding facts which may logically relate to Opposer's claim of a lack of a bona fide intent to use,¹ Applicant is permitted under the rules and the Board order to submit relevant portions in response. "If only part of a discovery deposition is submitted and made part of the record by a party, an adverse party may introduce under a notice of reliance any other part of the deposition which should in fairness be considered so as to make not misleading what was offered by the submitting party." Rule 2.120(j)(4). Applicant's Supplemental Notice of Reliance states with sufficient clarity and specificity the justification for the deposition portions cited by Applicant, namely to rebut and make not misleading those portions relied upon by Opposer.

Applicant's Denials of Requests for Admission

Applicant hereby withdraws its reliance on responses to Requests for Admission Nos. 110, 112, 114, and 116. The portion of the Board's previous order addressing these is clear, but the relevant footnote was overlooked by Applicant.

Applicant's Admission and Interrogatory Responses

Applicant has provided sufficient justification for its reliance on responses to Opposer's Request for Admission No. 174 and Opposer's Second Interrogatory Nos. 6, 8, 9, and 10. Even though Opposer objects to the inclusion of Applicant's response to Opposer's Second Interrogatory No. 7, Opposer already introduced it as testimony Opposer's Sixth Notice of Reliance.

Pursuant to 37 CFR § 2.120(j)(5):

An answer to an interrogatory, or an admission to a request for admission, may be submitted and made part of the record by only the inquiring party except that, if fewer than all of the answers to interrogatories, or fewer than all of the admissions, are offered in evidence by the inquiring party, the responding party may introduce under a notice of reliance any other answers to interrogatories, or any other admissions, which should in fairness be considered so as to make not misleading what was offered by the inquiring party. The notice of reliance filed by the responding party must be supported by a written statement explaining why the responding party needs to rely upon each of the additional discovery responses listed in the responding party's notice, failing which the Board, in its discretion, may refuse to consider the additional responses.

Regarding the responses to second interrogatories 6, 8, 9, and 10, Opposer has introduced responses related to the nature and relatedness of the parties' goods, including Applicant's response to Opposer's first Interrogatory No. 7 ("identify each product Applicant intends to offer, sell, or distribute....using Applicant's AQUAJETT Mark."). Applicant's responses to second interrogatories 6, 8, 9, and 10 relate to and rebut the portions introduced by Opposer because they also relate to Applicant's goods and to Opposer's claims regarding a lack of a bona fide intent to use.ⁱ The interrogatories and response introduced in Opposer's testimony include

Opposer's First Interrogatory No. 10 ("State all facts and identify all documents supporting Applicant's assertion... that it had... a bona fide intention to use Applicant's Mark in commerce in connection with the goods identified in the application.")

The relevant discovery requests from Opposer, for which Applicant introduced its responses in its Supplemental Notice of Reliance, are as follows:

Second Interrogatory No. 6:

In its Eleventh Affirmative Defense, Applicant references a letter sent by the law firm of Lord Bissell Brook LLP that allegedly shows "why there is no confusing similarity between the Applicant's marks ... AQUAJET and the Opposer's mark 'AQUAFRESH.'" This letter alleges that confusion is not likely to occur, in part, because oral irrigators are not related to toothpaste and toothbrushes. Explain the basis for Applicant's contention that oral irrigators are unrelated to toothpaste and toothbrushes.

Second Interrogatory No. 7:

Identify each product that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using Applicant's AQUAJETT Mark.

Second Interrogatory No. 8:

Identify each oral irrigator product that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark OMNIJET.

Second Interrogatory No.9.

Identify each oral irrigator product that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark OMNIPIK.

Second Interrogatory No. 10.

Identify each oral irrigator product that Applicant intends to offer, sell, or distribute in the United States bearing, displaying, or using the mark AQUAPIK.

Applicant's responses to these interrogatories rebut Opposer's discovery testimony claims regarding the marks, the goods, and the lack of a bona fide intent.

Applicant's Supplemental Notice of Reliance sufficiently justified the inclusion of the relevant interrogatory responses because they go to the nature, and therefore relatedness, of the parties' goods, a subject clearly contained in the responses introduced by Opposer.

Conclusion

The discovery responses and deposition portions discussed herein are proper and were properly introduced by Applicant. Applicant has submitted sufficient and proper justification for each part of this testimony.

Dated this 14th day of August, 2009.



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Enclosure

Exhibit 2: Pages 22-24, 29-32, 36 -39, 41-42, 45-46, 51-52, and 58-59 from the February 27, 2008, Deposition Transcript of William R. Weissman, President of Applicant Omnisource DDS, LLC

ⁱ Applicant vigorously opposes Opposer's claim of a lack of bona fide intent, and any reference by Applicant herein to Opposer's claim should not be read to support or agree with it in any way.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of APPLICANT'S RESPONSE TO OPPOSER'S MOTION TO STRIKE APPLICANT'S SUPPLEMENTAL NOTICE OF RELIANCE has been served on the following by delivering said copy on August 14, 2009, via First Class Mail, postage prepaid, to counsel for Opposer at the following address:

Glenn A. Gundersen
Dechert LLP
Cira Centre, 2929 Arch Street
Philadelphia, PA 19103-2808

By: _____



Erik M. Pelton, Esq.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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SmithKline Beecham Corporation
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Opposition No. 91178539

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Mark:

AQUAJETT

**APPLICANT'S RESPONSE TO
OPPOSER'S MOTION TO STRIKE
APPLICANT'S SUPPLEMENTAL NOTICE OF RELIANCE**

APPLICANT'S NOTICE OF RELIANCE EXHIBIT 2

Pages 22-24, 29-32, 36 -39, 41-42, 45-46, 51-52, and 58-59 from the
February 27, 2008, Deposition Transcript of
William R. Weissman, President of Applicant Omnisource DDS, LLC

[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

09:39:27 3 Q. When we started talking earlier this morning, you
09:39:50 4 indicated that Omnisource plans to or is hoping to sell
09:39:51 5 a number of oral care goods, including oral irrigators.
09:39:54 6 Are the oral irrigators that are described in these
09:39:57 7 patents, the products Omnisource -- specifically the
09:40:00 8 oral irrigators that Omnisource is working on or that
09:40:03 9 you intend to sell?

09:40:05 10 A. Yes.

09:40:09 11 Q. Aside from the products that are described in
09:40:11 12 these three patents, does Omnisource intend to sell any
09:40:16 13 other oral irrigators?

09:40:18 14 A. No.

09:40:20 15 Q. What is the target audience or the target market
09:40:37 16 for the oral irrigators that Omnisource intends to sell?

09:40:42 17 A. To the general consuming public who's interested
09:40:47 18 in oral care goods.

09:40:49 19 Q. Ordinary consumers?

09:40:51 20 A. Ordinary consumers.

09:40:53 21 Q. What about dental professionals such as dentists,
09:41:01 22 orthodontists, endodontists?

09:41:04 23 A. They could potentially purchase these.

09:41:09 24 Q. Purchase them for use in their profession or for
09:41:12 25 their own personal use?

09:41:13 1 A. Either.

09:41:17 2 Q. So is it -- let me start over. Are you intending
09:41:28 3 to sell this product to dental professionals
09:41:30 4 specifically for use in their profession?

09:41:35 5 A. I haven't really thought about exactly who or
09:41:42 6 when these would be sold or to whom.

09:41:46 7 Q. Okay. Let's talk a little bit about ordinary
09:41:53 8 consumers. Would ordinary consumers use the products
09:41:57 9 that are described in these patents at home?

09:42:01 10 A. Yes.

09:42:01 11 Q. Would they use them in their bathroom?

09:42:05 12 A. Yes.

09:42:06 13 Q. Would these products be hooked up to a source of
09:42:10 14 water?

09:42:11 15 A. Yes.

09:42:13 16 Q. And that would be from a sink?

09:42:15 17 A. Correct.

09:42:16 18 Q. Could it be from a shower?

09:42:18 19 A. Potentially.

09:42:19 20 Q. Would you need a plumber to install this product?

09:42:26 21 A. No.

09:42:26 22 Q. And in your experience, are patients -- do your
09:42:38 23 patients brush their teeth, floss their teeth in the
09:42:44 24 bathroom? Is that where they're likely to brush their
09:42:48 25 teeth?

09:42:48 1 A. That's likely.

09:42:49 2 Q. Patients typically brush their teeth in front of
09:42:54 3 a sink?

09:42:55 4 A. That's likely.

09:42:57 5 Q. How about in the shower?

09:42:59 6 A. That might happen also.

09:43:01 7 Q. The product that's described in these patents,
09:43:10 8 have you installed it here at your office?

09:43:13 9 A. No.

09:43:14 10 Q. You don't use it in your practice?

09:43:16 11 A. Correct.

09:43:16 12 Q. Have you selected a brand name for this product?

09:43:36 13 A. No. I have several names that I have applied for
09:43:39 14 trademark names, but not any one specifically that's
09:43:42 15 been selected.

[REDACTED]

[REDACTED]

09:51:23 11 Q. Now, we looked earlier at your patents, Opposer's
09:51:32 12 Exhibit 4, 5, and 6, those patents which were issued in
09:51:36 13 1996. 2, 3, and 4. Thank you for pointing that out.

09:51:45 14 A. Could you restate the question?

09:51:46 15 Q. These patents were issued in 1996. What have you
09:51:52 16 done since then to bring the oral irrigator products
09:51:55 17 that are described in these patents to market?

09:51:58 18 A. Nothing.

09:52:01 19 Q. So I'm correct in assuming that you have no
09:52:11 20 current inventory of oral irrigators?

09:52:14 21 A. Correct.

09:52:14 22 Q. No prototypes?

09:52:16 23 A. Just the original prototype from the 1996 patent.

09:52:20 24 Q. Is that in your possession?

09:52:23 25 A. No.

09:52:24 1 Q. In whose possession is that prototype?
09:52:28 2 A. My brother.
09:52:28 3 Q. James Weissman?
09:52:30 4 A. Correct.
09:52:30 5 Q. Is that something he has at his dental practice?
09:52:36 6 A. I haven't asked him where he is storing that.
09:52:41 7 Q. But to your knowledge, he doesn't use it in his
09:52:44 8 dental practice?
09:52:45 9 A. Correct.
09:52:45 10 Q. Do you have any schematics for this product, how
09:52:54 11 it would be built?
09:52:55 12 A. No.
09:52:55 13 Q. Have you identified what types of materials would
09:53:02 14 be used to construct this product?
09:53:04 15 A. No.
09:53:05 16 Q. Have you entered into any agreements to
09:53:07 17 manufacture this product?
09:53:08 18 A. No.
09:53:09 19 Q. Have you given any thought to where these
09:53:11 20 products would be made, manufactured?
09:53:13 21 A. No.
09:53:14 22 Q. Do you plan to manufacture them yourself or do
09:53:23 23 you plan to contract with a third-party to manufacture
09:53:26 24 them?
09:53:26 25 A. More than likely, contract with a third-party.

09:53:33 1 Q. Have you identified any potential third-parties
09:53:38 2 to manufacture the product for you?

09:53:40 3 A. No.

09:53:40 4 Q. Have you done anything to identify any potential
09:53:47 5 third-parties?

09:53:47 6 A. No.

09:53:48 7 Q. Are you planning to sell oral irrigators
09:54:04 8 yourself, or are you planning to license them to
09:54:08 9 third-parties who would then sell them to consumers?

09:54:11 10 A. Both ways have been contemplated, but no decision
09:54:17 11 has been made.

09:54:18 12 Q. You haven't decided one way or the other?

09:54:21 13 A. Correct.

09:54:21 14 Q. And am I correct in assuming that you obviously
09:54:25 15 had not made that decision at the time that you filed
09:54:28 16 your trademark applications either?

09:54:30 17 A. Correct.

09:54:30 18 Q. Have you given any thought to what types of
09:54:37 19 third-parties that you would license this product to?

09:54:40 20 A. Generally, companies which would be in the oral
09:54:48 21 care industry.

09:54:53 22 Q. If I could clarify that answer a little bit, what
09:54:55 23 segment of the oral care industry, if any?

09:55:01 24 A. That would probably be any companies that would
09:55:04 25 be in the oral care industry who are in the preventative

09:55:12 1 oral care field.

09:55:14 2 Q. So you would potentially license the oral

09:55:24 3 irrigators that are described in your patents to

09:55:26 4 companies that produce oral care products that are used

09:55:28 5 to prevent tooth decay, if I may?

09:55:34 6 A. Correct.

09:55:34 7 Q. So companies that, for example, make

09:55:36 8 toothbrushes?

09:55:38 9 A. Correct.

09:55:39 10 Q. Companies that make dental floss?

09:55:42 11 A. Correct.

09:55:43 12 Q. Companies that sell other oral irrigators?

09:55:46 13 A. Correct.

09:55:46 14 Q. Have you identified any specific companies to

09:55:53 15 license your product to?

09:55:55 16 A. No.

09:55:58 17 Q. What, if anything, have you done to identify any

09:56:05 18 potential licensees?

09:56:07 19 A. Being a dentist, I'm aware of the different

09:56:12 20 companies that are involved with dental care. So those

09:56:16 21 would just be general companies that would come to my

09:56:19 22 mind.

09:56:19 23 Q. But you have not contacted any specific

09:56:26 24 companies?

09:56:26 25 A. Back in 1990, back when this was done, I remember

09:56:35 1 I did send off letters to different oral care companies
09:56:39 2 regarding the oral irrigator.

09:56:43 3 Q. So at the time that your patient was issued or
09:56:47 4 some time -- early '90s or mid '90s?

09:56:52 5 A. Anywhere between 1990 and 1996, '97.

09:56:59 6 Q. You would have made these contacts?

09:57:02 7 A. Correct.

09:57:02 8 Q. And do you remember what you did in that regard?

09:57:09 9 A. To my recollection, I sent off letters to the
09:57:14 10 different companies.

[REDACTED]

[REDACTED]

10:02:18 15 Q. So you -- aside from retail stores, you have not
10:02:23 16 given any -- you have not identified any specific
10:02:26 17 locations where this product might be sold?
10:02:29 18 A. Correct.
10:02:30 19 Q. And before I asked the question, before I
10:02:32 20 mentioned retail stores, was that something you had
10:02:34 21 thought about before?
10:02:38 22 A. About selling it in retail stores? Is that what
10:02:40 23 you're asking me?
10:02:41 24 Q. Yes.
10:02:42 25 A. Yes.

10:02:42 1 Q. Aside from retail stores, have you thought about
10:02:46 2 any other place where this product might be sold?

10:02:49 3 A. Potentially to dental offices.

10:02:52 4 Q. If Omnisource was to sell the product to dental
10:02:58 5 offices, how would you go about doing that?

10:03:00 6 A. That hasn't been thought about yet.

10:03:04 7 Q. As a dentist, am I correct in assuming that you
10:03:11 8 purchase supplies for your practice?

10:03:13 9 A. My office staff purchases supplies.

10:03:17 10 Q. From whom do they purchase their supplies?

10:03:20 11 A. Supply houses.

10:03:22 12 Q. These are companies that specialize in selling
10:03:26 13 supplies to dental practitioners?

10:03:29 14 A. Correct.

10:03:29 15 Q. Have you identified any dental supply houses to
10:03:38 16 whom you might offer your oral irrigator products?

10:03:41 17 A. No.

10:03:41 18 Q. Aside from the dentist supply house that you use
10:03:47 19 in your own practice, have you identified any other
10:03:51 20 dental supply houses -- or let me rephrase that. Are
10:03:54 21 you aware of any other dental supply houses?

10:03:56 22 A. I'm aware of several different supply outlets
10:04:00 23 that provide dentistry supplies.

10:04:05 24 Q. But you have not discussed your oral irrigator
10:04:08 25 product with any of those dental supply houses?

10:04:11 1 A. Correct.

10:04:11 2 Q. You said that the product could conceivably be
10:04:32 3 sold in retail stores. Do you have any specific types
10:04:35 4 of retail stores in mind?

10:04:37 5 A. No.

10:04:39 6 Q. You said earlier that Omnisource has no employees
10:04:57 7 other than yourself and your brother, James Weissman?

10:05:00 8 A. Correct.

10:05:01 9 Q. Am I correct in assuming that you have not hired
10:05:04 10 any salespeople to market your oral irrigator product?

10:05:08 11 A. Correct.

10:05:09 12 Q. Has Omnisource ever had any employees other than
10:05:16 13 yourself and Dr. Weissman, your brother James?

10:05:19 14 A. No.

10:05:20 15 Q. You said that the potential sales outlets for
10:05:36 16 this product, your oral irrigator product, they've not
10:05:40 17 been thought of yet. Am I correct in assuming that
10:05:45 18 that's true today, and it was also true at the time that
10:05:48 19 you filed your applications?

10:05:49 20 A. Yes.

10:05:50 21 Q. At the time that you filed your applications, had
10:05:57 22 you identified the potential markets for this product?

10:06:03 23 A. Could you explain what you mean by "potential
10:06:06 24 markets"?

10:06:06 25 Q. Sure. At the time you filed your applications,

10:06:08 1 were you planning to sell this product to ordinary

10:06:11 2 consumers?

10:06:12 3 A. Yes.

10:06:14 4 Q. Were you planning to sell it to dental care

10:06:17 5 professionals?

10:06:18 6 A. That was a potential.

[REDACTED]

10:10:43 25 A. Dentists go to that show and exhibitors from

10:10:46 1 different oral care companies go to that show.

10:10:50 2 Q. How often is that show held?

10:10:54 3 A. Once a year.

10:10:55 4 Q. How many times have you gone?

10:10:57 5 A. Usually once a year.

10:11:00 6 Q. Do you know if your brother goes to the show?

10:11:06 7 A. Yes, he goes to the show.

10:11:06 8 Q. Once a year?

10:11:09 9 A. Yes.

[REDACTED]

[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
10:14:56 3 MR. BERTIN: I've marked as Opposer's Exhibit 10
10:14:59 4 the Applicant's Supplement Responses to Opposer's First
10:15:02 5 Set of Interrogatories to Applicant. This is a filing
10:15:09 6 that was made in this case by the Applicant, Omnisource,
10:15:14 7 DDS.

8 (Opposer's Exhibit 10 was marked for
9 identification by the court reporter.)

10 BY MR. BERTIN:

10:15:16 11 Q. Show that to you, Dr. Weissman. Have you seen
10:15:18 12 that before?

10:15:19 13 A. I don't recall if I've seen it before, but I can
10:15:46 14 see it now.

10:15:46 15 Q. Okay. Can I direct your attention to the second
10:15:50 16 page. This is an interrogatory which says "State all
10:15:58 17 facts and identify all documents supporting Applicant's
10:16:01 18 assertion in its application Serial No. 78/893,144 that
10:16:07 19 it had as of the application filing date a bona fide
10:16:10 20 intention to use Applicant's mark in commerce in
10:16:13 21 connection with the goods identified in the
10:16:16 22 application."

10:16:16 23 Now, below that is the answer to this
10:16:18 24 interrogatory, which was provided by Omnisource. And
10:16:22 25 the last paragraph says, "See documents produced by

10:16:28 1 Applicant. Applicant's bona fide intent to use the
10:16:31 2 Aquajett mark in commerce is evidence in Applicant's
10:16:36 3 patent filings and other documents indicating an
10:16:37 4 intention to manufacture dental instruments." Do you
10:16:40 5 see that, Dr. Weissman?

10:16:41 6 A. Yes.

10:16:42 7 Q. The reference there to "patent filings," am I
10:16:51 8 correct in assuming that Omnisource is referring to
10:16:54 9 opposer's Exhibits 3, 4, and 5?

10:16:56 10 A. Right.

10:16:57 11 Q. 2, 3, and 4. Excuse me.

10:17:06 12 A. 2, 3, and 4.

10:17:07 13 Q. There's a reference here to "other documents."

10:17:20 14 A. Yes.

10:17:21 15 Q. The question is what other documents is
10:17:23 16 Omnisource referring to here?

10:17:25 17 A. Off the top of my head, I can't place which other
10:17:33 18 documents that would be referring to. The filings for
10:17:38 19 the patents seem like the main reference as to the use
10:17:47 20 of the potential trademark names.

[REDACTED]

[REDACTED]

10:25:12 14 MR. BERTIN: Mark as Opposer's Exhibit 12 a
10:25:16 15 document dated June 1st, 2006.
16 (Opposer's Exhibit 12 was marked for
10:25:20 17 identification by the court reporter.)
10:25:20 18 BY MR. BERTIN:
10:25:21 19 Q. Dr. Weissman, do you recognize this document?
10:25:22 20 A. Yes.
10:25:26 21 Q. And what is it?
10:25:27 22 A. The minutes of the meeting in June 2006 with
10:25:35 23 James Weissman and myself.
10:25:36 24 Q. The meeting of?
10:25:39 25 A. Omnisource.

10:25:43 1 Q. Are these the minutes from your annual meeting?

10:25:45 2 A. Yes.

10:25:48 3 MR. BERTIN: And let's mark as Opposer's

10:25:51 4 Exhibit 13 a document dated June 14th, 2007.

5 (Opposer's Exhibit 13 was marked for

6 identification by the court reporter.)

7 BY MR. BERTIN:

10:25:58 8 Q. Do you recognize that document.

10:26:00 9 A. Yes.

10:26:00 10 Q. And what is it?

10:26:02 11 A. Similar to the prior document, but for the year

10:26:06 12 2007.

10:26:06 13 Q. Are these the only annual reports that you

10:26:13 14 prepared for Omnisource?

10:26:15 15 A. Yes.

10:26:15 16 Q. Omnisource was created in 2005; is that correct?

10:26:19 17 A. Correct.

10:26:20 18 Q. It says in Opposer's Exhibit 12, if I can direct

10:26:32 19 your attention there, paragraph one, it says "Events of

10:26:37 20 significance of the past year include the following:

10:26:40 21 The continued research and development of new and novel

10:26:44 22 products for the dental marketplace for both the

10:26:45 23 consumer and the dental profession." To what were you

10:26:48 24 referring there?

10:26:49 25 A. Oral irrigators, toothbrush, mouthwash, dental

10:35:38 1 Have you done any research at the UCLA School of
10:35:43 2 Dentistry with regard to oral irrigators?

10:35:45 3 A. No.

10:35:45 4 Q. The next paragraph reads "We are currently
10:35:48 5 contacting companies that have an interest in
10:35:49 6 commercializing our research products."

10:35:51 7 Are you referring there to the mouthwash and
10:35:54 8 toothpaste products referenced in the prior paragraph?

10:35:57 9 A. Correct.

10:35:58 10 Q. Are you referencing any other products?

10:36:01 11 A. No.

10:36:01 12 Q. So when you say "We will be signing NDAs with
10:36:06 13 interested parties and then determining if potential
10:36:09 14 sale or licensing agreements can be made," those would
10:36:12 15 be NDAs with companies interested in your mouthwash and
10:36:17 16 toothpaste?

10:36:18 17 A. Correct.

10:36:21 18 MR. BERTIN: I'd like to designate this section
10:36:24 19 of the transcript confidential. There is a protective
10:36:28 20 order in place which prevents the parties from
10:36:31 21 disclosing information that is confidential to
10:36:34 22 third-parties, and that section of the transcript will
10:36:37 23 be bound separately.

24 (Whereupon, the confidential portion began.)

25 //

1 BY MR. BERTIN:

10:36:41 2 Q. Dr. Weissman, who are the interested

10:36:44 3 third-parties that you mentioned in this last paragraph

10:36:47 4 that we've been looking at?

10:36:49 5 A. Companies such as Johnson & Johnson; Galaxo,

10:37:01 6 Smithkline; Discus Dental. Those companies.

10:37:09 7 Q. Have you signed non-disclosure agreements with

10:37:13 8 any of those companies?

10:37:14 9 A. A non-disclosure was signed with Discus Dental.

10:37:19 10 Q. Have you entered into any other agreements with

10:37:22 11 any of these companies with regard to your mouthwash or

10:37:26 12 toothpaste products?

10:37:28 13 A. No.

10:37:28 14 Q. Am I correct in assuming that you have not

10:37:32 15 offered your oral irrigator product to any of these

10:37:35 16 companies?

10:37:35 17 A. Correct.

10:37:35 18 Q. Do you intend to offer your oral irrigator

10:37:38 19 product to any of these companies?

10:37:40 20 A. That's a potential.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]